

## Zoning Board of Appeals

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**From:** Zoning Board of Appeals <zba@westtisbury-ma.gov>  
**Sent:** Friday, February 25, 2022 9:28 AM  
**Subject:** FW: West Tisbury ZBA question

Hi All, Here is the reply to the 9.2-2 question. Please, as always, no email discussion. I will put the correspondence on the agenda for the next meeting. Thank you, Pam

Pam Thors, West Tisbury Zoning Board Administrator

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**From:** Michael Goldsmith <mgoldsmith@rrklaw.net>  
**Sent:** Friday, February 18, 2022 11:15 AM  
**To:** Zoning Board of Appeals <zba@westtisbury-ma.gov>  
**Cc:** lhscarpentry@comcast.net  
**Subject:** RE: West Tisbury ZBA question

Pam. I am sending this to you and your chair, as I do not want inadvertently to be the source of a serial email communication, which generally does not comply with the open meeting law. I did not invest time doing legal research on this question, but rather will give my impression and judgment from handling zoning matters and appeals for almost twenty-three years.

I understand the perspective of the members who desire that all applicants for specials permits should be required to devote time, energy, thought and perhaps money to figuring out, in advance, whether their project meets the zoning by-law's criteria for a special permit. The problem with requiring an applicant to "certify" that they meet the various under Section 9.2-2, other applicable provisions requiring showings, however, is that, ultimately, it is the Board's evaluation of the problem or issue at hand which matters, not the applicant's. The Board makes factual findings after the close of a special permit hearing, and then reaches a decision and, depending on the issue, imposes conditions. On appeal to a court, a reviewing judge is bound to make their own factual findings, but does not substitute their judgment for the Board's judgment.

A relatively old decision from the Appeals Court summarized the Board's role in the special permit process well:

"Although the judge concluded that the proposed construction would only have a minimal effect on the water storage capacity of the flood plain district, we hold that it is the board's evaluation of the seriousness of the problem, not the judge's, which is controlling. The evidence . . . indicates that there was a basis for the board's concern as to lost storage capacity, and that reasonable persons could differ as to the severity of danger from flooding. In such circumstances the board's decision was not arbitrary and must prevail."

[Subaru of New England, Inc. v. Board of Appeals](#), 8 Mass. App. Ct. 482, 487-88 (1979).

To me, the applicant's certification is therefore of little value to the Board and would not eliminate its independent duty to consider the evidence and make any necessary findings. I think it is a great idea in your application materials to provide citizens with the general special permit criteria and advise them that it is their responsibility to bring forward evidence and information that will allow the Board to make all necessary findings to support a decision to grant a special permit for any particular project or use which, by definition, is not something allowed as of right. The Board can also go through the criteria with an applicant and ask what evidence they have collected on the particular requirements identified in Section 9.2-2. I cannot say that it would legally improper to require such a certification, but I think it could lead to problems if the Board elects to rely on the certification to deny an application – since it is the Board's duty to evaluate the evidence produced at a public hearing. Again, it is the Board's assessment of the seriousness of a problem that is key. The applicant's view of the viability of their application, abutter concerns, and input from other town boards are simply factors in the equation.

That is the way I come out on this question, but happy to explore it more if you wish.

Michael A. Goldsmith  
Director  
Reynolds, Rappaport, Kaplan & Hackney, LLC  
P.O. Box 2540  
106 Cooke Street  
Edgartown, MA 02539  
508-627-3711 (ext. 522)  
508-627-3088 (fax)  
[mgoldsmith@rrklaw.net](mailto:mgoldsmith@rrklaw.net)  
[rrklaw.net](http://rrklaw.net)

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**From:** Zoning Board of Appeals [<mailto:zba@westtisbury-ma.gov>]  
**Sent:** Thursday, February 17, 2022 12:48 PM  
**To:** Michael Goldsmith  
**Cc:** Andy Zaikis; Casey Decker; Deborah Wells ([dvbwells@aol.com](mailto:dvbwells@aol.com)); [JKaye51@comcast.net](mailto:JKaye51@comcast.net); John Rau; Julius B. Lowe; Larry Schubert ([lhscarpentry@comcast.net](mailto:lhscarpentry@comcast.net))  
**Subject:** West Tisbury ZBA question

Hi Michael, For a couple of months now the ZBA has been discussing including a copy of Bylaw Section 9.2-2 Review Criteria in the ZBA application packet. The purpose would be to let applicants know that the ZBA will use it as a tool to decide on their application. It is customarily listed as a finding in the Decision that this review takes place and in the case of an approval that the project is in compliance with the section, (see attached).

Originally it was thought that simply having the applicant verify that they had read through the section would be sufficient and would bring a valuable bit of info to the applicant prior to their hearing. At a certain point though, someone suggested that the onus be placed on the applicant to decide if they comply with each separate point in the bylaw.

Right now, a few members think that the onus should be put on the applicant to review the bylaw and decide point by point if their application is compliant. The other members feel that it is the board's responsibility to make that determination after reviewing the submitted application at the Public Hearing.

Before it goes any further, Larry asked me to request your opinion on whether the ZBA should follow through on either of these two options. Thank you, Pam

Pam Thors  
Board Administrator  
Zoning Board of Appeals  
Town of West Tisbury  
PO Box 278  
West Tisbury, MA 02575-0278  
508-696-0107 Phone  
508-696-0103 FAX

[zba@westtisbury-ma.gov](mailto:zba@westtisbury-ma.gov)

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